INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statutes and regulations involved	2
Statement	2
Argument	11
Conclusion	14
Appendix	15

CITATIONS

Cases:

Aldine Club v. *United States*, 65 C. Cls. 315	12
Bankers Club v. *United States*, 69 C. Cls. 121	12
Builders Club v. *United States*, 74 C. Cls. 595	12
Chemists' Club v. *United States*, 64 C. Cls. 156	12
Duquesne Club v. *Bell*, 127 F. 2d 363, certiorari denied, 317 U. S. 638	12
Houston Club v. *United States*, 74 C. Cls. 640	12
Merchants Club v. *United States*, 106 C. Cls. 562	12
Page v. *Squantum Ass'n*, 77 F. 2d 918	12
Turks Head Club v. *Broderick*, 166 F. 2d 877	12
Union Club of Pittsburgh v. *Heiner*, 99 F. 2d 259	13
Whitehall Lunch Club v. *United States*, 80 C. Cls. 350	12

Statutes:

Internal Revenue Code:	
Sec. 1650 (26 U.S.C. 1946 ed., Sec. 1650)	15
Sec. 1710 (26 U.S.C. 1946 ed., Sec. 1710)	11, 15
Sec. 1712 (26 U.S.C. 1946 ed., Sec. 1712)	16

Miscellaneous:

Treasury Regulations 43 (1941 ed.):	
Sec. 101.24	16
Sec. 101.25	18

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 181

THE UPTOWN CLUB OF MANHATTAN, INCORPORATED, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 18-23) is reported at 83 F. Supp. 823.

JURISDICTION

The judgment of the Court of Claims was entered on May 2, 1949. (R. 23.) The petition for a writ of certiorari was filed July 9, 1949. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1255.

QUESTION PRESENTED

Whether the petitioner is a social club within the meaning of Section 1710 of the Internal Revenue

Code which imposes an excise tax upon the initiation fees and dues paid by the members of such clubs.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the pertinent statutes and Regulations are set forth in the Appendix, *infra,* pp. 15-18.

STATEMENT

The special findings of fact of the Court of Claims (R. 8-18) may be summarized as follows:

For the period May 1, 1924, to April 30, 1928, the petitioner paid excise taxes with respect to the initiation fees and dues of its members under the provisions of Section 501 of the Revenue Acts of 1924 and 1926, which provisions are similar to those of Section 1710 of the Internal Revenue Code here involved and impose taxes upon initiation fees and dues of social, athletic, or sporting clubs. In 1928, petitioner filed a claim for refund of those taxes on the ground that it was not a social club within the meaning of the statute and that claim was allowed by the Commissioner of Internal Revenue on or about January 11, 1929. Thereafter, and until January, 1943, the Commissioner did not require the petitioner to pay taxes with respect to its dues and initiation fees. (R. 8.)

Following the decision, on April 13, 1942, of the United States Court of Appeals for the Third Circuit in *Duquesne Club* v. *Bell,* 127 F. 2d 363, in which it was held that the club there involved was

a social club, the Commissioner reversed his prior position and advised the petitioner that it qualified as a social club and, therefore, should proceed with the collection and payment of the prescribed taxes. However, the ruling was prospective only in its application. (R. 8-9.)

After receiving the Commissioner's ruling in February, 1943, petitioner duly filed monthly returns of excise taxes on initiation fees and dues collected from the club members during the period February, 1943, to and including September 30, 1946, and paid the amounts so collected to the appropriate Collector of Internal Revenue in the aggregate amount of $43,799.21. (R. 9).

On December 11, 1946, petitioner filed a claim for refund in the amount of $38,573.89 on account of the taxes paid as above stated, contending that it was not a social club within the meaning of Section 1710 of the Internal Revenue Code. In support of its claim petitioner filed the documents required by the relevant Regulations, including such powers of attorney as were executed by those members protesting the tax. The difference ($5,225.32) between the amount paid ($43,799.21) and the amount claimed in the claim for refund ($38,573.89) represents taxes paid by members who did not execute powers of attorney and the petitioner in this proceeding waives that amount.

Between the years 1924 and 1946 there has been no material change in the purpose or character of the petitioner's activities. (R. 10.)

Petitioner was evolved from an association known in 1917 as the Fifth Avenue Association which was composed of merchants on Fifth Avenue, New York City. At that time, the leaders of that organization conceived the idea of creating a luncheon club where members could discuss matters of common interest, and as a result the petitioner club was organized. Initially, the membership constituted the members of the Fifth Avenue Association but later the membership was extended to others and now includes members from various classes or groups of business interests. (R. 10.)

After two prior locations, the petitioner in the year 1930 moved to its present location in the Lincoln Building at 60 East 42nd Street, New York City. At the time of the construction of that building the owners believed it desirable to have a luncheon club in the building as an inducement to prospective tenants, and as a result, arrangements were made to have the club occupy its present quarters. The rental charged the club under its original lease was $80,000 per year but during the subsequent depression period appropriate adjustments were made in the prescribed rental. At the present time, the club is paying $60,000 per year for its quarters, which is less than the rental paid by other tenants for comparable space. (R. 10-11.)

The affairs of the club are managed by twenty-four directors, who are known as governors and who are elected from the membership. The governors elect a president, one or more vice presidents,

a secretary and a treasurer and such other officers as may be deemed necessary for the proper management of the club. The governors also elect five members from their group who together with the officers constitute an executive committee which directs and manages the affairs of the club subject to the direction of the board of governors. (R. 11.)

Any male person of the age of twenty-one years or over may be elected a member of the club subject to the requirements of the by-laws. The number of members, which may be determined by the governors, may not exceed one thousand for each of the two classes of membership, resident and non-resident. A resident member is one who has either a residence or a place of business within the City of New York or within fifty miles thereof, and a non-resident member is one who does not come within this category. (R. 11.)

Under the constitution and by-laws of the club, candidates for membership must be proposed and seconded in writing by two members who are not governors. The proposer and seconder must submit to the governors a statement in writing concerning the qualifications of the person proposed for membership. No candidate for resident membership may be voted upon unless personally known to at least two members of the board of governors. Two adverse votes of the governors reject any candidate and such candidate may not again be proposed for a period of one year. All proceedings of

the governors relating to nominations of candidates or elections of members are secret and confidential. (R. 11-12.)

The constitution and by-laws prescribe an initiation fee for resident members of $200 and for non-resident members of $50 and annual dues of $125 for resident members and $25 for non-resident members. These fees are subject to modification by the board of governors and for several years the initiation fee was waived but was reinstated during 1945 in the amount of $100 for resident members and $50 for non-resident members; these are the fees in effect at the present time. Members are entitled to invite guests to enjoy the facilities of the club. (R. 12.)

The Lincoln Building where the club is located is in the Grand Central zone of New York City. The club's quarters are on the twenty-sixth and twenty-seventh floors of that building. The furnishings of the club cost originally $125,000 and the total cost to the club for furniture, fixtures and equipment to and including November 30, 1946, was $178,672. However, depreciation in the amount of $167,349 has been written off on petitioner's books with respect to these assets, with the result that the undepreciated cost as of November 30, 1946, was $11,323. During the ten-month period ended March 31, 1948, the club expended $10,273.28 in redecorating the premises and replacing silverware, glassware, linen, etc. (R. 12-13.)

The quarters of the club on the twenty-sixth floor of the building consist principally of the main dining room and the kitchen facilities. The dining room is divided into three sections with connecting alcoves and has a seating capacity of 363 persons. The quarters of the club on the twenty-seventh floor of the building consist of seven private dining rooms, lounge, reception hall, lobby, bar and grill, ladies' dining room with reception and powder rooms, administrative offices and accessory accommodations such as toilets, cloak room and elevator entrances. The lounge, lobby and reception hall are furnished with leather upholstered chairs and davenports with adjacent tables for ashtrays and suitable lamps for lighting and reading purposes. In the lobby, a news ticker and stock quotation ticker as well as two cigar stands are provided. Also in the lounge is a large table on which are placed newspapers and periodicals for the use of members and their guests. The club subscribes to Time, Life, Saturday Evening Post, Newsweek, Business Week, The New Yorker, Collier's, New York Times, New York Herald Tribune, Wall Street Journal, New York Sun, and the New York World Telegram. The bar is adjacent to the grill and both rooms are furnished with leather upholstered chairs, wall seats and suitable tables. (R. 13.)

Prior to January, 1946, the club operated on a six-day per week basis, Monday through Saturday, but since the advent of the forty-hour week, the

club has operated on the basis of a five-day week, Monday through Friday. The club is open from 7:00 a. m. until 6:30 p. m. The employees with the exception of the bar and office employees, leave at 3:00 p. m. Breakfast and luncheon may be obtained at the club but only about five breakfast meals are served daily. (R. 14.)

The principal activity of the club is during the luncheon period from about noon to about 2:30 p. m. During the year 1946 the average number of luncheons served per day was 400 and the average luncheon check amounted to approximately $2.15. Members and their guests may have drinks served at the luncheon tables, at the tables in the bar or grill, or at the bar itself. Two bartenders are employed at the club and arrive for duty about 8:45 a. m., alternating in leaving every other day at 3:30 p. m. or 6:00 p. m. The principal activity at the bar is during the period from noon to 3:00 p. m. when luncheon is being served but the bar is patronized by a few members at the close of the business day. (R. 14.)

The reception hall, lobby and lounge are used by the members and their guests while waiting for luncheon, after they have finished luncheon and at other times. Coffee is served without charge in the lounge during the luncheon period in order to encourage members to leave the tables in the dining room promptly after having been served and thereby release the tables for the use of others. (R. 15.)

The ladies' dining room and attendant facilities, including a reception room, a powder room and toilet facilities, are appropriately furnished. Wives and female members of a member's family over eighteen years of age are permitted to use these facilities and may invite guests. When a member is accompanied to the club by a lady for luncheon, he is required to dine with her in the ladies' dining room. Ladies are not permitted beyond the area of the ladies' quarters at the club and the areas of ingress and egress thereto except when attending meetings in the private dining rooms. The average number of ladies served daily in the ladies' dining room during the year 1946 was approximately twenty-five. (R. 15.)

The club has a reciprocal arrangement with two other clubs, one located in downtown New York and the other in Philadelphia, under which arrangements the members of each club have the privilege of using the facilities of the other club or clubs. Appropriate identification cards are issued to members desiring to avail themselves of these facilities. (R. 15.)

No games are played at the club and no radios or musical instruments are provided. The club has no card rooms, barber shop, gymnasium or dormitories and no dances, lectures or concerts are held there. (R. 16.)

During the six-month period June 1, to November 30, 1946, the total receipts from the dining rooms, bar and humidors were in the respective

amounts of $101,834.42, $22,496.90 and $11,196.18. During the same period initiation fees amounted to $2,850 and dues, $44,217.08. (R. 16.)

During the year 1946, the club had 500 resident members and 100 non-resident members, which was the full membership permitted at that time. (R. 16-17.) The members came from some twenty different business and professional groups (R. 17), including, among others, representatives of the chemical, petroleum, copper, cement, steel, and pulp industries, the advertising profession, the law, accountancy, real estate, and banking. In addition, the club had four junior members during the year 1946 under a class of membership which was created during the war period for sons of members in order to build up a nucleus for the future growth of the club. (R. 17.)

The club serves as a convenient and comfortable place for its members to obtain luncheon under less crowded conditions and more expeditiously than in many of the other better eating places in that area. The cost of a meal at the club is comparable to the cost of a meal at the better eating places in that area. Matters of a business nature may, of course, be discussed at the club and some corporations and business groups have regularly reserved tables where executives, department heads and similar officials and employees of a business organization have luncheon together and discuss problems connected with or related to their organization. The private dining rooms are in demand for

meetings by business groups. However, there is no limitation or understanding at the club or among the members as to what subjects shall be discussed at the club, and in addition to business topics and matters of common interest, the usual topics of the day are discussed. (R. 18).

On the basis of these findings, the Court of Claims held that petitioner "had no predominant business purpose; that its social features were not incidental, but were a material part of the club's activities, and that during the period in question it was a social club within the meaning of Section 1710 of the Revenue Code" [Appendix, *infra*, p. 15] (R. 23).

ARGUMENT

1. The petitioner has failed to advance any substantial ground for further review of this case. Its principal reliance in seeking the writ of certiorari appears to be the asserted failure of the Court of Claims to adhere to the position previously assumed in similar cases. Obviously, such a contention, even if well-founded, furnishes no reason in itself for review in this Court. It would deprive the lower court of its inherent right to alter its views and require the perpetuation of an announced philosophy which had subsequently been proved to be erroneous.

It is true that the Court of Claims has decided several so-called luncheon-club cases favorably to

the taxpayers,[1] but each case, as stated by the court in the present opinion (R. 20), has been decided on the facts peculiar to that particular taxpayer, and those decisions are not determinative of the issue here.[2]

Contrary to the assertion by the petitioner (Pet. 6), there is at present no conflict of decisions between the Court of Claims and the Courts of Appeals for the First and Third Circuits. The most recent decisions by all three courts have sustained the respondent's contention. In so doing the Courts of Appeals have expressly changed their views with respect to the taxability of luncheon clubs which provide facilities for social contacts to their membership. The Court of Appeals for the First Circuit in *Turks Head Club* v. *Broderick*, 166 F. 2d 877, specifically overruled its prior decision in *Page* v. *Squantum Ass'n*, 77 F. 2d 918, and similarly the Court of Appeals for the Third Circuit in *Duquesne Club* v. *Bell*, 127 F. 2d 363, certi-

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[1] *Chemists' Club* v. *United States*, 64 C. Cls. 156; *Aldine Club* v. *United States*, 65 C. Cls. 315; *Houston Club* v. *United States*, 74 C. Cls. 640; *Bankers Club* v. *United States*, 69 C. Cls. 121; *Whitehall Lunch Club* v. *United States*, 80 C. Cls. 350; *Builders Club* v. *United States*, 74 C. Cls. 595; *Merchants Club* v. *United States*, 106 C. Cls. 562.

[2] In the two Court of Claims cases on which petitioner especially relies (Pet. 6, 9), the findings and opinions reveal the differentiating factors. The only facility which the Aldine Club afforded its members was that of furnishing a businessmen's lunch at moderate cost, and the club used the premises only between 12 m. and 3 p. m. 65 C. Cls. 315, 318, 320. The Merchants Club was primarily for cotton textile merchants and served "as semiofficial headquarters for the selling end of the cotton textile industry", with a very close connection with the industry's trade association. 106 C. Cls. 562, 571, 576.

orari denied, 317 U. S. 638, renounced the view previously expressed in *Union Club of Pittsburgh* v. *Heiner*, 99 F. 2d 259.

2. On the merits of the case, the Court of Claims arrived at the correct conclusion that the petitioner is a social club within the intendment of Section 1710 of the Internal Revenue Code. The findings reveal that the petitioner is, for all practical purposes, a luxurious town club. In addition to the dining facilities, the club has a spacious lounge attractively and comfortably furnished where daily newspapers and many popular periodicals are provided for the use of members and their guests. News and stock market tickers are available. The club also provides a completely equipped bar with an adjacent grill. The place is open daily from Monday through Friday, exclusive of holidays, from 7:00 a. m. to 6:30 p. m., and members and their guests may patronize the club at any time during those hours. Two bartenders are on duty until 3:30 p. m. and from that time until 6:00 p. m., one is present. Special ladies' quarters are maintained, and all female members of members' families are privileged to use these quarters and may invite guests. Members having lady guests at the club for luncheon are required to use the ladies' dining room.

While naturally the principal activity at the club is during the luncheon period, all of the other facilities provided are available through the entire day,

and are clearly social in character. And, as the Court of Claims pointed out, there is no showing of a predominant business purpose even in the luncheon arrangements or the composition of the club (R. 22-23). The "social features . . . were not only a material, but perhaps a major purpose of the club" (R. 22).[3]

CONCLUSION

The petition for certiorari presents no question warranting review, there is no present conflict of decisions, and the conclusion of the Court of Claims appears to be correct. Therefore, the petition should be denied.

Respectfully submitted,

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SEPTEMBER, 1949.

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[3] The club's certificate of incorporation stated its objects as "to establish, maintain and operate a club, with a reading room and other accommodations for the use and convenience of its members . . ." (R. 10).

APPENDIX

1. Internal Revenue Code:

SEC. 1710. TAX.

(a) [As amended by Section 543(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687] *Rate.*—There shall be levied, assessed, collected, and paid—

(1) *Dues or membership fees.*—A tax equivalent to 11 [4] per centum of any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $10 per year.

(2) *Initiation fees.*—A tax equivalent to 11 per centum of any amount paid as initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $10 per year.

* * * * *

(b) *By Whom Paid.*—The taxes imposed by subdivision (a) shall be paid by the person paying such dues or fees, or holding such life membership.

(26 U.S.C. 1946 ed., Sec. 1710.)

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[4] Section 1650 of the Internal Revenue Code, added by Section 210 of the Revenue Act of 1940, c. 419, 54 Stat. 516, was amended by Section 302(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21, to increase the rate of tax to 20 per cent effective April 1, 1944.

SEC. 1712. DEFINITIONS.

As used in this subchapter—

(a) [As amended by Section 543(b) of the Revenue Act of 1941, *supra*] *Dues.*—The term "dues" includes any assessment, irrespective of the purpose for which made, and any charges for social privileges or facilities, or for golf, tennis, polo, swimming, or other athletic or sporting privileges or facilities, for any period of more than six days; and

* * * * *

(26 U.S.C. 1946 ed., Sec. 1712.)

2. Treasury Regulations 43 (1941 ed):

Sec. 101.24 *Determination of Character of Club.*—The purposes and activities of a club or organization *and not its name* determine its character for the purpose of the tax. Every club or organization having social, athletic, or sporting features is presumed to be included within the meaning of the phrase, "any social, athletic, or sporting club or organization," until the contrary has been proved, and the burden of proof is upon it. Every such club or organization, therefore, unless it falls within the express exemption of the Code (see section 101.30), must collect, return, and pay over the tax imposed by the Code, unless and until it has satisfied the Commissioner of Internal Revenue that it is not in fact "social, athletic, or sporting" within the meaning of the Code and as defined in these regulations. If any

such club or organization claims that it is not in fact "social, athletic, or sporting," it shall submit to the collector a copy of its charter or constitution and by-laws, together with a statement showing its actual purposes, activities, practices, and facilities, the character of its expenditures, and such other evidence as may be requested. Upon consideration of the evidence submitted the collector will determine, if he can do so, whether or not such club or organization comes within the provisions of the Code. If, however, the collector is in doubt as to whether or not the club or organization is "social, athletic, or sporting," he will refer the statement and accompanying papers to the Commissioner for decision. When a club or organization has been held not to be a "social, athletic, or sporting" club or organization it need not thereafter make a return or any further showing with respect to its status under the law, unless it changes the character of its organization or operations or the purpose for which it was originally created. Collectors will keep a list of all clubs and organizations held not to be "social, athletic, or sporting" clubs or organizations, to the end that they may occasionally inquire into their status and ascertain whether the conditions upon which their exemption was predicated remain unchanged. If the collector decides that the club or organization comes within the provisions of the Code and the club or organization is not satisfied with his decision, it may request that the matter be referred to the Commissioner for a ruling.

Sec. 101.25 *Social Clubs.*—Any organization which maintains quarters or arranges periodical dinners or meetings, for the purpose of affording its members an opportunity of congregating for social intercourse, is a "social * * * club or organization" within the meaning of the Code, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, chamber of commerce, commercial club, trade organization, or the like, merely because it has incidental social features, but if the social features are a material purpose of the organization it is a "social * * * club or organization" within the meaning of the Code. An organization that has for its exclusive or predominant purpose religion or philanthropic social service (or the advancement of the business or commercial interests of a city or community) is clearly not a "social * * * club or organization." Most fraternal organizations are in effect social clubs, but if they are operating under the lodge system, or are local fraternal organizations among the students of a college or university, payments to them are expressly exempt (see section 101.30).

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